



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 4, 2004

Mr. Brian J Begle
Olson & Olson
Three Allen Center
333 Clay Street, Suite 3485
Houston, Texas 77002

OR2004-0822

Dear Mr. Begle:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 195571.

The City of Freeport (the "city"), which you represent, received a request for the personnel files of five named individuals, contact information for the city's registered agent for service of process, all "complaints of discrimination or any conduct in violation of Title VII of the Civil Rights Act of 1964," and information regarding the city's investigation of discrimination complaints made by a named individual. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note that the information at issue includes medical records, access to which is governed by the Medical Practice Act (the "MPA"), Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). Information subject to the MPA includes both medical records and information obtained from those medical records. Open Records Decision Nos. 598 (1991). In addition, because hospital treatment is routinely conducted under the supervision of physicians, documents relating to diagnosis and treatment during a hospital stay would constitute protected MPA records. Open Decision Nos. 598 (1991), 546 (1990).

Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked the information that constitutes medical records and may only be released in accordance with the MPA.

We next address the applicability of section 552.022 of the Government Code to the submitted information. This section provides that "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108" and "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body" constitute "public information . . . not excepted from required disclosure . . . unless . . . expressly confidential under other law." Gov't Code § 552.022(a)(1), (3). The submitted information includes completed reports and evaluations and a contract relating to the expenditure of public or other funds by the city. Such information is subject to section 552.022. The contract may not be withheld unless it is confidential under other law, and the reports and evaluations may not be withheld unless they are excepted from disclosure under section 552.108 or are confidential under other law. You do not claim that any of the submitted information is excepted from disclosure under section 552.108. You assert instead that these records may be withheld pursuant to section 552.103 of the Government Code. This section is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103). Therefore, the information that is subject to section 552.022 may not be withheld under section 552.103 of the Government Code. Because you do not contend, and our review does not indicate, that these records contain information the release of which is prohibited by other law, section 552.022 requires the city to release these documents, which we have marked.¹

¹Some of the records marked for release contain information relating to the requestor's client that might be excepted from disclosure to the general public under laws and exceptions designed to protect privacy. However, as the representative of the subject of the information, the requestor has a special right of access to this information. *See* Gov't Code § 552.023(b) (governmental body may not deny access to person to whom

We turn now to the remaining submitted information, which is not subject to section 552.022. Section 552.103 provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 647 at 2 (1996).

The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.*

You indicate that, prior to the city's receipt of this request, the requestor's client filed a complaint with the Equal Employment Opportunity Commission ("EEOC") alleging discrimination and that the EEOC has dismissed the complaint and issued the requestor's client a notice of right to sue. Based on the information you have provided, we conclude that you have shown that litigation was reasonably anticipated when the city received this request. *See, e.g.,* Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982) (pending EEOC

information relates, or that person's representative, solely on grounds that information is considered confidential by privacy principles).

complaint indicates litigation is reasonably anticipated). In addition, based on your representations and our review of the remaining submitted information, we agree that this information is related to the anticipated litigation for purposes of section 552.103(a). Thus, you have demonstrated the applicability of section 552.103.

We note, however, that the remaining submitted information includes a personnel policy manual and the requestor's client's personnel file. Once information has been obtained by all parties to the litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). Therefore, to the extent the requestor's client, who is apparently the only opposing party in the anticipated litigation regarding his complaint, has had access to the submitted information, it may not be withheld under section 552.103 and must be released. We also note that the applicability of section 552.103(a) ends when the litigation is concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

In summary, the marked medical records may only be released in accordance with the MPA. The records that are subject to section 552.022 must be released in accordance with that provision. The remaining submitted information may be withheld under section 552.103 to the extent it has not been seen by the opposing party in the anticipated litigation.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one

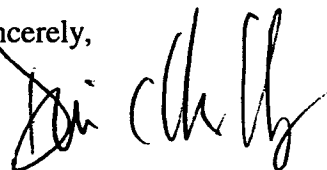
of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 195571

Enc. Submitted documents

c: Mr. Taft L. Foley
The Foley Law Firm
P.O. Box 770184
Houston, Texas 77215-0184
(w/o enclosures)